NO. 18551

United States Court Of Appeals

NINTH CIRCUIT

HOWARD P. CARROLL and H. CARROLL & CO.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANTS

Appeal from the United States District Court for the
Southern District of California,
Central Division

W. H. ERICKSON
C. HENRY ROATH
1611 First National Bank Bldg.
Denver 2, Colorado

DAVID M. GARLAND
3424 Via Oporto
Newport Beach, California

Attorneys for Appellants

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STATEMENT OF THE CASE

The Appellee's Answer Brief is replete with argument and contains certain misstatements of the record which require correction. The Appellants have no quarrel with the Appellee's statement of the pleadings and facts disclosing jurisdiction and the statutes involved. However, the Appellants cannot accept the Appellee's statement of facts which was offered for this Court's consideration.

Manipulation was not in fact charged as the Appellee sets forth nor does the record reflect evidence which would show that Country Club Charcoal of California was a defunct company. No evidence establishes the presence of an escrow or the terms of the escrow at

The Securities Transfer Corporation in Denver, Colorado. The government relies wholly on Exhibit 22 to bring about their conclusion that 313,000 shares of escrowed stock were sold, and the admissibility of that exhibit is seriously in question. No connection would place Howard P. Carroll or H. Carroll & Co. in the position where responsibility could attach to them for the preparation of the ubiquitous brown brochure, nor does the record reflect any connection between Howard P. Carroll and David Alison in the formation of Country Club Charcoal of California or Country Club Charcoal of Nevada. H. Carroll & Co. was an over-the-counter dealer that had as its officers Howard P. Carroll, as president, Robert Leopold, vice-president, and Gerald M. Greenberg, secretary-treasurer (R. 255, 313, 336). In examining the record, nothing appears which would tie Howard P. Carroll into the merger of Country Club Charcoal into Comstock, Ltd. by David Alison. The opening brief analyzes the record as to the representations which are charged as being false.

In replying to the Argument which has been placed before the Court by the Appellee, the Appellants will follow the order set forth by the Appellee, even though the Appellee has elected to disregard the order of the argument set forth in the opening brief, which was an apparent attempt to postpone the recognition of the obvious inadmissibility of Exhibit 22.

REPLY TO APPELLEE'S ARGUMENT

A. The Appellants' pre-trial motion to strike surplusage in the indictment was improperly denied by the trial court.

The motion to strike was properly filed in the trial court, and no objection was made by the Appellee or by the court as to the time of filing. The allegations complained of in the indictment were on their face shotgun statements which were made to avoid the specificity required in pleading a criminal charge. When allegations are on their face irrelevant, prejudicial, and inflammatory no further showing need be made. United States v. Bonnano, 177 F. Supp. 106 (D.C. S.D. N.Y. 1959); United States v. Pope, 189 F. Supp. 12 (D.C. S.D. N.Y. 1960).

It is respectfully submitted that the trial court erred in denying the motion to strike.

B. The prosecution of Counts One, Five and Six of the indictment was barred by the Statute of Limitations.

It is admitted by the Appellee in their brief that the only transaction between the defendants and the Count One, Five and Six purchasers was the mailing of a stock certificate after the sale was consummated. With the stock certificate was a receipt form which was to be executed by the purchaser and returned to the defendant corporation. The question for determination was thus narrowed to whether or not the term "sale", as used in Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), includes delivery after

sale. In short, does delivery after the sale has been completed and the consideration paid show the date on which "such offense shall have been committed"? It is interesting to note that the cases cited by the Appellee on page 20 of their brief do not stand for the proposition for which they are cited. It is apparent from all cases cited, as well as the definition of the term "sale" itself, that the term "sale" is not synonymous with the term "delivery after sale," nor is the term "disposition" synonymous with the term "delivery." Of the six cases cited by the Appellee, four cases are criminal and two are civil. The two civil cases, Creswell-Keith, Inc. v. Willingham, 264 F.2d 76 (8th Cir. 1959), and Schiller v. H. Vaughan Clarke & Co., 134 F.2d 875 (2nd Cir. 1943), merely provide authority for the proposition that the use of the mails for delivery after sale confers jurisdiction, and additional cases appear in the Appellants' brief to support the well-established jurisdictional basis for a mail fraud case. None of the cases cited assist in determining whether or not delivery is necessary to complete the offense. The Creswell case stated clearly that "mails and interstate commerce provision is inserted only for jurisdictional purposes," and the Court's jurisdiction is not questioned in this case.

Of the four criminal cases cited, United States v. Sampson, 371 U.S. 75 (1962); Kopald-Quinn & Co. v. United States, 101 F.2d 528, cert. den. 307 U.S. 628 (5th Cir. 1939); United States v.

Robertson, 181 F. Supp. 158, aff'd. in part, rev'd. in part 298 F.2d 739 (D.C. S.D. N.Y. 1959); and United States v. Monjar, 47 F. Supp. 421, aff'd. 147 F.2d 916, cert. den. 325 U.S. 859 (D.C. Del. 1942), the Sampson case relates to mail fraud only. In a mail fraud case, mails must be used "for the purpose of executing" the scheme. In that case, letters delivered by the mails after receipt of payment in an "advance fee" scheme were considered to be "lulling letters" and thus necessary "for the purpose of executing" the scheme. Delivery of a stock certificate, or any security for that matter, was not involved. The cases of Kopald-Quinn & Co. v. United States, supra; United States v. Robertson, supra, and United States v. Monjar, supra, are all cases arising, at least in part, under Section 17(a) of the Securities Act. The Kopald case makes no reference whatsoever to a sale including delivery after sale. In the Monjar case, the only reference to the use of mails relates to written confirmations of sales, which for the purpose of this case is not an issue, since it is clear that confirmation of the sales were sent more than five years prior to the finding of the indictment. In the Robertson case some assistance is given to the court in the definition of the term "sale." It is clear in the Robertson case, that in a Securities Act fraud the purpose of the scheme was to be paid, and once payment was received, the scheme was completed without delivery. Judge Hurlands, at page 163, states:

> "In that respect it seems correct to say that the seller regards his bargain equivalent as the money obtained when the check is collected and that the purchaser victim suffers his actual injury when his bank account is charged with the check given in payment." United States v. Robertson, 181 F. Supp. 158, 163 (C.C. S.D. N.Y. 1959).

Congress, in its drafting of the Securities Act, did not see fit, in either Section 17 (the fraud and the sale section) or in Section 2(3) (the definition section) to include delivery after sale in the definition of sale. It is here important to note that in Section 5 of the Securities Act of 1933 (the registration section) a separate and distinct violation is set forth as follows: "to carry or cause to be carried through the mails or in interstate commerce by any means or instruments of transportation any such security for the purpose of sale or for delivery after sale." It thus appears clear that the object of any fraudulent sale of securities has "been committed" at such time as offer and acceptance, with payment, has been made and that subsequent delivery after sale, while perhaps conferring jurisdiction, would not toll the statute of limitations.

C. The testimony of Ralph Frank concerning a telephone call to H. Ward Dawson was improperly received in evidence.

The Dawson-Frank conversation was not introductory and was offered to establish the truth of the matters asserted therein. Busby v. United States, 296 F.2d 328 (9th Cir. 1961), does not

supply authority for the admission of the evidence. In the Busby case, testimony was admitted for the sole purpose of showing the basis for an investigation centering around a robbery, and the limitation of the purpose for the admission of the testimony appears clearly in the case. Busby v. United States, 296 F.2d 328, 332 (9th Cir. 1961).

Moreover, the common scheme or plan exception does not come into play until independent evidence establishes a combination or a conspiracy. To make the common scheme or plan exception applicable, the government would have to place dawson and Frank in the position of co-conspirators. Independent evidence does not appear which would make the scheme, plan, or design exception applicable.

D. There was error committed in the procedures employed by the trial court.

For the sake of brevity and because all of the points raised by the Appellee were fully covered in the opening brief, the selective points set out by the Appellee will not be answered. An examination of the record discloses that warning after warning was given on leading questions and that the prosecution presented nearly all of its evidence by the use of leading questions with their parrot-like answers. The action of the United States Attorney was frequently criticized by the court, and as a result of the leading questions, the court took an active

part in the trial of the prosecution's case. In the very case cited by the Appellee, Ochoa v. United States, 167 F.2d 341 (9th Cir. 1948), this Court recognized the danger of the judge assuming or appearing to assume the role of an advocate and of the necessity of the court's assiduously maintaining an attitude of judicial impartiality between the accused and the accuser. It is apparent that this Court has made it abundantly clear that the trial must be conducted in an atmosphere as antiseptic as that of the operating room. An examination of the record will disclose that such an atmosphere did not exist during the time that Howard P. Carroll and H. Carroll & Co. were standing trial. The case of Holt v. United States, 218 U.S. 245 (1910), which is cited by the Appellee, was decided prior to the case of Eierman v. United States, 46 F.2d 46 (10th Cir. 1930), and when closely read, contains the following analysis of the court's reasoning:

> "Technically the offer of the evidence had to be made in their presence before any question excluding them could arise. They must have known, even if they left the Court, that statements relied on as admitting part or the whole of the Government's case were offered. The evidence to which they listened was simply evidence of facts deemed by the judge sufficient to show that the statements, if any, were not freely made, and it could not have prejudiced the prisoner." Holt v. United States, 218 U.S. 245, 249 (1910).

The quoted statement of the court is in complete line with the Eierman case, supra, which sets forth the broad proposition that it is the best procedure to have all preliminary evidence ruled

on out of the presence of the jury, unless the preliminary evidence is clearly of a non-prejudicial character. The prejudicial nature of the evidence against Howard P. Carroll and H. Carroll & Co. becomes obvious when a conviction is before this Court that is not supported by competent or sufficient evidence.

E. There is not sufficient evidence to sustain the conviction of the Appellants on all counts.

The points raised by the Appellee require no answer. The broad statements of fundamental principles of law ignore the facts before this Court. An analysis of the evidence appears in the Appellants' brief (pp. 91-112). The Appellee states, without setting forth a citation to the record, that the charcoal brochure was materially false and that Howard P. Carroll paid for its preparation. No evidence exists to show that Howard P. Carroll had any connection with the preparation of the brown charcoal brochure, and the falsity of the statements in the charcoal brochure do not appear in the record.

It is respectfully submitted that manipulation was not charged and that the evidence before the trial court and the evidence before this Court is insufficient to sustain a conviction.

F. The trial court did commit prejudicial error in the admission of documentary evidence.

1. Exhibit 1.

Exhibit 1 is a carbon copy of six notes that David Alison

delivered to Archie Chevrier. The notes had nothing to do with the Denver escrow, as the Appellee urges. In fact, the notes were replaced with additional notes which were not in evidence. Marvin Greene, who was an attorney employed by the Securities and Exchange Commission, did not have any conversation with Howard P. Carroll relating to the notes which comprised Exhibit 1. No evidence tied Howard P. Carroll into the notes, and no evidence exists which would establish any connection between Howard P. Carroll or H. Carroll & Co. and David Alison or Archie Chevrier.

It is respectfully submitted that the notes were necessarily hearsay and that no proper foundation was offered for their admission.

2. Exhibit 22.

The record is silent as to the reason that the Securities and Exchange Commission sought information from J. Edward Fleischell. The Appellee has supplied, by way of conclusion, the purpose in stating that the Securities and Exchange Commission obtained the letter to determine the number of stock certificates and the number of shares in escrow in Denver, Colorado. No evidence establishes that the letter was kept in the ordinary course of business by the Securities and Exchange Commission. The only evidence which exists establishes that the letter was received as part of the investigative effort of the Securities and Exchange Commission (R. 462). It is impossible, in the light of the

record, to determine whether the information contained in Exhibit 22 is true or false, and for that reason alone the wisdom behind the formulation of the hearsay rule becomes apparent. No opportunity to cross-examine J. Edward Fleischell existed, and no foundation establishes any connection between J. Edward Fleischell and either of the Appellants who stood trial. Bisno v. United States, 299 F.2d 711 (9th Cir. 1961), does not support the admission of Exhibit 22, as the Appellee contends. In the Bisno case, supra, the letters in question came from the defendant's own file. In the instant case, we know not where the information contained in Exhibit 22 came from or how Mr. Fleischell obtained it. The exhibit is the rankest hearsay. Exhibit 27, moreover, does not fill the vacancy created by the inadmissibility of Exhibit 22. Exhibit 22 makes no reference whatsoever to an escrow or to Denver. The exhibit simply shows the certificate numbers, shares represented thereby, and the record holders shown on the certificates and relayed to Mr. Fleischell by some person or persons by means yet unknown. The total number of shares listed in Exhibit 22 is 495,266. Exhibit 27 (letter receipt from Securities Transfer Corporation to H. Carroll & Co.) shows only what certificates and the number of shares represented thereby which were in fact delivered by the Securities Transfer Corporation to H. Carroll & Co. The total number of shares of Comstock Ltd. stock so delivered and receipted for is far less

than the total number of shares listed on Exhibit 22. Exhibit 27 does mention the existence of an escrow without naming the parties to the escrow. No escrow agreement ever was presented, and no stock was ever traced to the escrow, other than by Exhibit 22. No evidence appeared which would establish that the shares of Comstock Ltd. received by H. Carroll & Co. from the Securities Transfer Corporation were in fact purchased by H. Carroll & Co., except in two isolated instances where payment was acknowledged. The remaining parts of Exhibit 27 merely show that H. Ward Dawson acknowledges receipt of payment for a certain number of shares and that such shares were delivered to H. Carroll & Co.

The Appellee, in contending that the admission of Exhibit 22 was harmless error, requires comment. In determining whether the error complained of was harmless or plain, the Appellants admit that the oft-quoted decision of Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L.Ed. 1557 (1946), is a landmark insofar as both Rule 52, F.R.Crim.P. and the Harmless Error States, 28 U.S.C. 2111, are concerned. The portion of the Kotteakos opinion which the Appellants feel points out the substantial nature of the right involved was quoted by the Eighth Circuit in Sanchez v. United States, 293 F.2d 260 (8th Cir. 1961), in considering objectionable hearsay testimony that furnished part of the government's evidence of a narcotics violation. In the Sanchez case, an informer's statement to a government agent out of the presence of

the defendant was admitted over a hearsay objection. In holding that the substantial rights of the defendant were prejudiced and that there was no requirement for defense counsel to continually object to the same class of testimony, the court quoted from Kotteakos v. United States, supra, and said:

> "'. . . The question is, not were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. Cf., United States v. Socony Vacuum Oil Co., supra (310 U.S. 150, at [pages] 239, 242) (60 S.Ct. 811, at pages 851, 853, 84 L.Ed. 1129), Bollenbach v. United States, supra (326 U.S. 607, at page 614), 66 S. Ct. 402, 406, 90 L.Ed. 350.
>
> "'This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened and one must judge others reactions not by his own but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.
>
> "'If when all is said and done the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno v. United States, supra (308 U.S. 287) at [page] 294, (60 S.Ct. 198 at page 200, 84 L.Ed. 257). But if one cannot say with fair assurance after pondering all that happened, without stripping the erroneous action from the whole, that the judgment was not substantially swayed by error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether it was insufficient to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'"

"Applying the rules so well stated, we are not left with the conviction that the error did not influence the jury or that it had but slight effect." Sanchez v. United States, 293 F.2d 260, 267 (8th Cir. 1961).

In a counterfeiting case, United States v. Campanaro, 63 F. Supp. 811 (E.D. Pa. 1945), a treasury agent was allowed to testify that counterfeit obligations similar to those found in the possession of the defendant appeared in California, and the answer was not limited to facts within the agent's knowledge, but necessarily included hearsay. The prosecution urged that the admission of evidence pertaining to the discovery of similar counterfeit obligations in California was merely cumulative and harmless and did not prejudice the defendant. Judge Bard, however, held that intent to defraud was a crucial part ofthe government's charge and that it was pure conjecture to determine what evidence the jury looked to to find criminal intent. Therefore, the court found that the testimony complained of, which was hearsay in nature, was prejudicial to the defendant and not harmless.

In a subornination of perjury case, Culwell v. United States, 194 F.2d 808 (5th Cir. 1952), the court, in reviewing a contumacious effort by an attorney to sway a white slave prosecution by the procurement of false testimony, reviewed the record and reversed, saying:

"Considering the meagerness of the government's evidence and considering the effect that the errors had or reasonably may have had upon the jury's decision, we think the mass of inadmissible testimony must have had a

substantial, prejudicial effect on the jury. In any event, we are unable to say that the errors did not influence the jury or that they had but slight effect. Kotteakos v. United States, 328 U.S. 750, 764, 66 S. Ct. 1239, 90 L.Ed. 1557." Culwell v. United States, 194 F.2d 808, 810.

No evidence appears in the record that would take the place of Exhibit 22. Therefore, it is submitted that the error committed in the admission of Exhibit 22 not only prejudiced the defendants, but also caused the defendants to suffer a conviction on the rankest of hearsay.

3. Exhibits 28, 29, 30, and 31.

The Appellants' opening brief fully covers the contentions raised by the Appellee (Point Two, p. 37). Unless Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958), is to be totally emasculated and overruled, the admission of Exhibits 28, 29, 30, and 31 constitutes plain error and requires reversal or dismissal.

4. Exhibits 18 and 104.

The inadmissibility of Exhibits 18 and 104 was fully dealt with in the Appellants' opening brief (Point Two, p. 40). The best that the Appellee could offer this Court for the admission of Exhibit 18 was the so-called testimony of Liboslav Uhlir that similar confirmations crossed his desk while he was at H. Carroll & Co.

As to Exhibit 104, the government only had Gaither Loewenstein, who saw the scraps called business records that William Ziering obtained from Archie Chevrier in the basement of the

San Francisco Mining Exchange. The manner in which the records were kept and a foundation that would tie Howard P. Carroll or H. Carroll & Co. to Exhibits 18 and 104 was totally lacking. The Appellee would have this Court believe that the Business Records as Evidence Act (28 U.S.C. 1732) and Bisno v. United States, 299 F.2d 711 (9th Cir. 1961), grant carte blanche authority for the admission of any documentary evidence. Such is not the case. Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958); Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L.Ed. 645, 144 A.L.R. 719 (1943); Standard Oil Company v. Moore, 251 F.2d 188 (9th Cir. 1957).

It is respectfully submitted that Exhibits 18 and 104 were improperly admitted.

5. Exhibits 105 and 106.

The fallacy which is apparent in the Appellee's argument on the admission of Exhibits 105 and 106 becomes apparent when considered in the light of the record. Exhibit 105, according to Howard Sillick, was prepared from Exhibit 22 and from the Nevada Transfer Agency records (Exhibits 28, 29, 30, and 31; R. 741).

Inaccuracies appearing in any summary are not for the consideration of the jury and are not subject to correction by cross-examination. If the summary is inaccurate, it should not be admitted. Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954).

Corbett v. United States, 238 F.2d 557 (9th Cir. 1956), recognizes the right of an expert to summarize other evidence in a proper case, provided that procedural safeguards are observed and provided further that the jury is properly instructed as to the basis upon which the testimony and charts are admitted to explain the primary evidence. A fortiori, if the proper procedural safeguards are not applied, the evidence is inadmissible. Noell v. United States, 183 F.2d 334, cert. den. 340 U.S. 921 (9th Cir. 1950). Applying the Court's reasoning in both the Noell and Corbett cases, we come up with the conclusion that the Appellee is contending that Mr. Sillick's testimony was merely a summary of evidence which was incompetent or not in evidence at all.

G. The trial court did commit error in its Instructions to the jury.

The instructions when read as a whole show the demeanor of the trial court, and although inflection and the manner of delivery do not appear in the cold printed record, prejudice is created. The court's colloquy with counsel, as set forth in the opening brief, poignantly displays the error complained of and the prejudice which resulted to the defendants.

CONCLUSION

It is respectfully submitted that the conviction and sentence against the Appellants should be set aside and the case dismissed.

Respectfully submitted,

W. H. ERICKSON
C. HENRY ROATH
1611 First National Bank Bldg.
Denver 2, Colorado

DAVID M. GARLAND
3424 Via Oporto
Newport Beach, California

Attorneys for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this Reply Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Reply Brief is in full compliance with those rules.

W. H. ERICKSON